CASE NO. 2009-CA-00281

IN THE SUPREME COURT OF MISSISSIPPI

BILL STANLEY,

Appellant

versus

BOYD TUNICA, INC. D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL

Appellee

On Appeal from the Circuit Court of Tunica County, Mississippi

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BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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July 22, 2009

IN THE SUPREME COURT OF MISSISSIPPI

BILL STANLEY **APPELLANT**

VS. **CASE NO. 2009-CA-00281**

BOYD TUNICA, INC. D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Albert B. Smith, III
   Tunica County Circuit Court Judge

2. Bill Stanley
   Appellant

3. Boyd Tunica, Inc.
   Appellee

4. Dana J. Swan, Esquire
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RESPECTFULLY SUBMITTED, THIS the 22nd day of July, 2009.

RICHARD C. WILLIAMS, JR. (MSB #[redacted])

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II. Whether the evidence presented showed any genuine issue of material fact concerning whether a dangerous condition existed.

III. Whether the evidence presented showed any genuine issue of material fact concerning whether Boyd Tunica had notice of any alleged dangerous condition.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The case *sub judice* arises out of a slip and fall incident, wherein the Plaintiff/Appellant, Bill Stanley (hereinafter "Stanley"), slipped and fell while taking a shower in one of the hotel rooms at Sam's Town Hotel in Tunica, Mississippi. Stanley brought suit against the Defendant/Appellee, Boyd Tunica, Inc. d/b/a Sam's Town Hotel and Gambling Hall (hereinafter "Boyd Tunica" or "Boyd") alleging that he sustained personal bodily injury as a result of negligence on the part of Boyd Tunica, and seeking damages. Boyd Tunica asserts that Stanley has failed to meet his burden of proof as to a *prima facie* case of negligence against Boyd, and as there is no genuine issue of material fact concerning same, that Boyd Tunica is entitled to judgment as a matter of law.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On May 31, 2005, Bill Stanley filed suit against Boyd Tunica, Inc. d/b/a Sam's Town Hotel and Gambling Hall in the Circuit Court of Tunica County, Mississippi, alleging that Stanley sustained personal injury as a result of negligence on the part of Boyd Tunica when he slipped and fell while taking a shower in a Sam's Town Hotel room on June 10, 2002, and seeking damages as a result of said accident. [R.10-13.] On June 16, 2005, Boyd Tunica filed its Answer to Stanley's Complaint, admitting that Stanley was a business invitee of the hotel and casino at the time of the alleged incident, but denying that Boyd Tunica breached any duty owed to Stanley. [R.25-28.] On November 17, 2008, Boyd filed a Motion for Summary Judgment, stating that there was no genuine issue as to any material fact and that based on the evidence, Stanley failed to meet his burden of proof to show a *prima facie* case of negligence on the part of Boyd; therefore, Boyd was entitled to judgment as a matter of law. [R.130-132.] On January 20, 2009, the Circuit Court of Tunica County,

Mississippi, granted Boyd's Motion for Summary Judgment. [R.319-320.] Stanley filed a Notice of Appeal on February 19, 2009 [R.322.], and his Brief of Appellant was filed with this Court on June 25, 2009.

C. STATEMENT OF THE FACTS

The Plaintiff/Appellant's claim arises from an accident which occurred when Bill Stanley fell while showering in a Sam's Town Hotel room on June 10, 2002, when a rubber bath mat in the shower allegedly slipped from under him. [R.11.] The depositions of Bill Stanley and his wife, JoAnn Stanley, were taken on March 27, 2007. [R.145, 170] Mr. Stanley sat through his wife's deposition. [R.171.] Both Stanleys testified that they had visited Sam's Town Tunica on occasions prior to the subject visit and incident on June 10, 2002. Mrs. Stanley estimated they had visited Sam's Town "every three or six months starting in 1998," and that she and her husband had been guests at the Sam's Town Hotel "at least three or four times or so." [R.147-148.] Although they were both disabled, the Stanleys asked for no special room accommodations at the Sam's Town Hotel. [R.154, 167.]

On the visit in question, the Stanleys drove from Smyrna, Tennessee, after work and arrived at the Sam's Town Hotel and Casino "late at night" after a four hour drive. [R.149, 152.] After checking in, they went down from the room to play the slots until morning. [R.154.] The Stanleys "stayed most of the night [in the casino]," and returned to their room the next morning where they "slept quite a bit of the day." [R.149.] Mrs. Stanley testified that it was almost 5:00 p.m. when Bill Stanley decided to take his shower, and that the Stanleys last meal had been the night before, either at home in Smyrna, Tennessee, or during their trip to Tunica. [R.165.] Additionally, Bill Stanley had "health problems" prior to June 2002, although JoAnn Stanley recalled no medical problems or

doctor visits by her husband in the month prior to their trip to Tunica. [R.155-156.]

Both Stanley's testified that Mrs. Stanley took the first shower. [R.150, 173.] She took a shower between 2:00 and 3:00 o'clock p.m. [R.152.] Mrs. Stanley testified that lighting in the bathroom was adequate, and that she had no difficulty seeing while she was in the shower. [R.163] There was nothing unusual about the shower, the faucet worked properly, and the [water] from the showerhead stayed within the shower. [R.159.] She described the shower and tub at the hotel to be "like at home" and stated "[w]e don't have no metal bars [in the shower at home]." [R.160-161.]

Mrs. Stanley testified that the rubber shower mat was already in the tub when she got in. [R.151.] She stated that the tub was "slick" but denied using the rubber mat, stating "I was standing, more or less, behind the mat." [R.150-151.] Although she described the bathtub to be slick, she stated that she had no trouble maintaining her balance in the shower. [R.162.] When asked if she warned her husband about the bathtub being slick, she said that she did not remember, but stated "[w]e have been in tubs there that's been slick." [R.166.] She further testified that the shower mat was straight when she got out of the tub. [R.166.] According to JoAnn Stanley, she and her husband smoked cigarettes, drank coffee and watched T.V. for "more than thirty minutes" before he got in the bathtub to take a shower. [R.164.]

It was almost 5:00 p.m. when Bill Stanley decided to take his shower. [R.165.] Regarding how the incident occurred, Bill Stanley testified as follows: "And I remember getting in [the shower] and started to turn around to get the rest of my body wet, and that's the last thing I remember until I hit the floor." [R.174.] He testified that "as best he could remember", the mat probably started sliding when he moved his foot to turn around. When asked whether the mat was slippery when he got in the shower, he replied "[w]ell it's been a long time", but stated that it "didn't seem to [give

way any]". [R.178.] Stanley did not recall if the mat was centered when he got into the tub, stating "[t]hat, I don't know." [R.180.]

Tracey Rosebud, Boyd Tunica's Security-EMT responder, found Mr. Stanley sitting on the side of his bed holding his right arm and elbow. [R.183-184, 188.] Mr. Stanley told the Security Investigator, Tracey Rosebud, that he was lathered up and turned in the tub to rinse when the rubber mat slipped, which caused him to lose his balance and fall backward onto the tile floor outside the tub. [R.183-184, 188.] An inspection of the bathroom was made by Mr. Rosebud who determined that a rubber shower mat was found twisted in the shower/tub. [R.183-184, 188.] Further investigation revealed normal lighting in the bathroom and no other defects were found. [R.184, 190.] The Guest Accident Report was completed and signed for Mr. Stanley by his wife at his direction. [R.181.]

SUMMARY OF THE ARGUMENT

Bill Stanley has appealed the Tunica County Circuit Court's grant of summary judgment in favor of Boyd Tunica, claiming that the trial court erred in granting summary judgment as there were questions of fact concerning whether Boyd had notice of a dangerous condition which allegedly existed in the bathroom of the hotel room in which he was staying. The basis of Stanley's argument is his claim that Boyd had "exclusive control" of the hotel bathroom in which Stanley fell. This Court should affirm the trial court's grant of summary judgment because Stanley's claim is without merit.

Citing the Mississippi Supreme Court in *Fulton v. Robinson Industries, Inc.*, 664 So.2d 170, 175 (Miss. 1995), and the U.S. Fifth Circuit, applying Mississippi law in *Lindsey v. Sears, Roebuck and Company*, 16 F.3d 616, 617-618 (5th Cir. 1994), the Mississippi Court of Appeals summarized the law of premises liability thereby:

> The law of premises liability is that the owner or occupier of a business owes a duty to an invitee to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition or warn of dangerous conditions not readily apparent, which owner or occupant knows of, or should know of, in the exercise of reasonable care. However, the owner or occupant of a business is not an insurer of all injuries. The invitee is still required to use in the interest of his own safety that degree of care and prudence which a person of ordinary intelligence would exercise under the same or similar circumstance. *[M]erely proving the occurrence of an accident within the business premises is insufficient to prove liability; rather, the plaintiff must demonstrate that the operator of the business was negligent.*

Taylor v. Biloxi Regional Medical Center, 737 So.2d 435, 437 (¶5) (Miss. App. 1999) (internal quotations omitted).

In a negligence action based on premises liability, the plaintiff must show that the premises owner breached some duty owed to the entrant. Therefore, in this case, Stanley must show that Boyd Tunica breached its duty to him as an invitee to provide a reasonably safe premises. At the hearing

on Boyd Tunica's Motion for Summary Judgment, the trial court asked Stanley two questions: "[W]here is the evidence of a dangerous condition?" [R.3, Supplemental Volume], and "How did [the defendant] have knowledge of a dangerous condition?" [R.4, Supplemental Volume].

The undisputed evidence presented in this case showed that Stanley slipped and fell on a rubber bath mat while showering in a Sam's Town Hotel room. The rubber mat provided in the hotel shower was a kind customarily used for the obvious purpose of improving the safety of the premises for hotel patrons. There was no evidence that the bath mat was a dangerous instrumentality *per se*, or was placed in the shower in a dangerous manner. Rather, Stanley has argued that rubber bath mats are not supposed to slip; because the mat that slipped was in the hotel's bathtub it was under the hotel's control; and, therefore, Boyd should be liable.[1] Additionally, there was no evidence that Boyd Tunica had knowledge of any dangerous condition which allegedly existed.

Summary judgment is appropriate where the evidence before the Court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lott v. Purvis*, 2 So.3d 789 (Miss. App. 2009). On a motion for summary judgment, the question is whether there is any issue which should be tried by a jury. *Id.* The evidence in this case reveals that there is no genuine issue as to any material fact, and that based on that undisputed evidence coupled with the applicable Mississippi law, Stanley has failed to meet his burden to show a *prima facie* case of negligence on the part of Boyd Tunica. Therefore, Boyd Tunica is entitled to judgment as a matter of law, and the order of the trial court should be affirmed.

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[1] Stanley also alleges absence of hand bars in the shower as proof of negligence. This is not a case under the American with Disabilities Act, 42 U.S.C. § 12101, et. seq., and no duty or proof has been established by Appellant.

ARGUMENT

STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed by an appellate court *de novo*, and an appellate court's review is governed by the same standard used by the trial court. *Cothern v. Vickers, Inc.*, 759 So.2d 1241 (Miss. 2000). "The trial judge's decision will be reversed if a triable issue of fact exists; otherwise, the decision of the lower court will be affirmed." *Erby v. North Mississippi Medical Center*, 654 So.2d 495, 499 (Miss. 1995).

According to the Mississippi Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." M.R.C.P. Rule 56(c) (Westlaw, current with amendments received through June 1, 2008). In reviewing a motion for summary judgment the court considers "all admissions, answers to interrogatories, depositions, affidavits and any other evidence, viewing the evidence in a light most favorable to the non-movant." *Taylor Machine Works, Inc., v. Great American Surplus Lines Insurance Co.*, 635 So.2d 1357 (Miss. 1994). Where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment shall be entered by the trial judge. *Erby v. North Mississippi Medical Center*, 654 So.2d 495, 499 (Miss. 1995).

"The focal point of our standard for summary judgment is on *material* facts." *Id.* (Emphasis by the Supreme Court). Citing itself in an earlier decision analyzing the standard, the Supreme Court said:

The summary judgment movant has a burden of persuasion; a burden to establish that there

> is no genuine issue of material fact to be tried. *Pear River County Board v. South East Collection*, 459 So.2d 783, 785 (Miss. 1984); *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss. 1983). The party opposing the motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. *Smith v. First Federal Savings and Loan Association of Grenada*, 460 So.2d 786, 792 (Miss. 1984).
>
> Of importance here is the language of the rule authorizing summary judgment "where there is no genuine issue of *material* fact." *The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense . . . [T]he existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact.*

Erby v. North Mississippi Medical Center, 654 So.2d 495, 499 (Miss. 1995) (citing *Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss. 1985) (emphasis by the Court).

Where the nonmovant is unable to bring forth any credible evidence to prove facts supporting the essential elements of his claim, the defendant is entitled to summary judgment. *Cothern v. Vickers, Inc.*, 759 So.2d 1241 (Miss. 2000).

I. The trial court's grant of summary judgment was consistent with the evidence presented which revealed no genuine issue as to any material fact to be tried by a jury, and based on the undisputed evidence Boyd was entitled to judgment as a matter of law. The trial court did not err in granting Boyd's Motion For Summary Judgment, and therefore, the trial court holding should be affirmed.

Stanley alleges in his Complaint that he was injured as a result of negligence on the part of Boyd Tunica, based on premises liability, when he slipped and fell on a rubber bath mat in a hotel room shower which he claims constituted a "dangerous condition". [R.11-13; Brief of Appellant at 3-4, 7] In a premises liability claim, the first thing that the plaintiff must show is that the defendant breached the applicable standard of care owed to the entrant/plaintiff. *Simpson v. Boyd*, 880 So.2d 1047 (Miss. 2004). In this case, it is undisputed that Stanley was an invitee of the Sam's Town Hotel and Casino, and that Boyd Tunica/Sam's Town owed a duty to keep the premises in a reasonably

safe condition and to warn of any known dangerous condition which is not readily apparent to the invitee. [R.11-12, 26; Brief of Appellant at 7; *Lockwood v. Isle of Capri Corporation*, 962 So.2d 645 (Miss. App. 2007)]

In its Motion for Summary Judgment, Boyd Tunica showed that the material facts of the case were undisputed. The trial court agreed, stating in its Order Granting Defendant Boyd Tunica's Motion for Summary Judgment as follows:

> **In this case, the material facts are simple and undisputed.** Taking to the facts in a light most favorable to the Plaintiff, the Plaintiff slipped in a shower owned by the Defendant, on a bath mat manufactured by another defendant. **The Plaintiff has presented no evidence that would indicate that the hotel bathroom was unreasonably dangerous, or that the Defendant had any knowledge, either actual or constructive, of a dangerous condition** . . . This Court finds that even taking the facts as the Plaintiff presents them, there is no genuine issue of material fact. **There is no factual basis to support the contention that the hotel bathroom in question was unreasonably dangerous such that the Defendant had a duty to warn patrons of the danger. There is further no evidence that the Defendant knew or should have known that there existed a dangerous condition in that hotel room.** No evidence has been presented that other accidents have occurred involving bath mats in the casino hotel that would serve to put the Defendant on notice of a problem.

[R.319-320.] On review in this appeal, the material facts in this case have not changed. The undisputed, material facts still show no evidence that the hotel bathroom was unreasonably dangerous, and no evidence that Boyd Tunica knew or should have known of any alleged dangerous condition in the hotel room/bathroom of which it would have a duty to warn Mr. Stanley.

Where the material facts of the case are not in dispute, the trial court must then determine based on the established evidence whether the moving party is entitled to judgment as a matter of law. *Fruchter v. Lynch Oil Co.*, 522 So.2d 195 (Miss. 1998) ("movant has job of persuading the court, first, that there is no genuine issue of material fact and, second, that on the basis of the facts established, he is entitled to judgment as a matter of law."). In order to prevail on a motion for

summary judgment, "the movant needs only to demonstrate an absence of evidence in the record to support an essential element of the [non]movant's claim." *Cothern v. Vickers, Inc.*, 759 So.2d 1241, 1245 (Miss. 2000). Where a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth evidence which shows there is a genuine issue for trial. *Id.* In order to defeat a motion for summary judgment, "the nonmoving party must make a sufficient showing to establish the existence of the elements essential to his case." *Id.*

In its motion for summary judgment, Boyd Tunica showed that based on the undisputed facts, there was no evidence that any dangerous condition existed, and no evidence that Boyd Tunica had notice or knowledge of any alleged dangerous condition in the hotel bathroom. The burden then shifted to Stanley to show that there was some issue of fact concerning whether a dangerous condition existed and whether Boyd Tunica had notice of the alleged dangerous condition. Stanley failed to meet this burden, and accordingly failed to make a sufficient showing to establish the essential elements of his *prima facie* case of negligence. Therefore, Boyd Tunica's Motion for Summary Judgment was properly granted.

On appeal, the only issue raised by Stanley is that there is a triable issue of fact concerning Boyd Tunica's notice of a dangerous condition, which *assumes* that some dangerous condition existed. [Brief of Appellant at 3] However, the undisputed, material facts in this case have not changed, and do not show that a dangerous condition existed, much less that Boyd Tunica had notice that one existed.

A. The trial court's grant of summary judgment was consistent with the undisputed, material evidence which does not show that any dangerous condition existed.

Stanley claims that the rubber mat in the hotel shower constituted a dangerous condition.

[R.12.] It is undisputed in this case that Stanley fell while standing on a rubber mat in the hotel shower. However, the Mississippi Supreme Court has addressed this type of proof in a slip-and-fall case:

> Proof merely of the occurrence of a fall on a floor within business premises is insufficient to show negligence on the part of the proprietor. Proof that the floor on which the fall occurred had present thereon litter and debris is similarly insufficient; and the doctrine of *res ipsa loquitur* is inapplicable in cases of this kind. Annot., 61 A.L.R.2d 13 (1958).
>
> The basis of liability is negligence and not injury. That the proprietor of a store or similar place of business is not an insurer of the safety of persons who come upon the business premises is a principle of the law of negligence so familiar and so well established as to obviate the necessity of citing supporting authority.

Sears, Roebuck & Co. v. Tisdale, 185 So.2d 916, 917 (Miss. 1966); see also, *Bernard v. 33 Foods, Inc.*, 905 So.2d 1290, 1292 (Miss. App. 2004).

In *Galloway v. J.C. Penny Company*, the Mississippi Supreme Court held that a department store patron was not entitled to damages where she tripped and fell on a rubber mat in front of the entrance doors of the store. *Galloway v. J.C. Penny Company*, 235 So.2d 275, 276-277 (Miss. 1970). In that case, the Supreme Court noted that the mat was the kind which was customarily used at store entrances for the convenience and safety of customers, and was designed and placed at the entranceway to remedy hazardous conditions created by bad weather. *Id.* at 275-276. The Court went on to state that **it was the plaintiff's burden to show that the mat was either a dangerous instrumentality *per se* or that it was placed in front of the entrance way in a dangerous condition.** *Id.* at 276 (emphasis added). In holding that the plaintiff "did not even come close to meeting [this] burden of proof," the Supreme Court stated as follows:

> We think the Appellate Court of Illinois reasoned soundly in *Robinson v. Southwestern Bell Telephone* . . . when it said: **There remains no basis for liability of the defendant, unless it can be called negligence to have a rubber mat of this design in place. * * *** The

question of slipping is not here involved, except that **the defendant, like many business concerns, has installed rubber mats for the obvious purpose of improving the safety of the premises. Rugs or mats are widely used for this purpose . . . (T)he use of ordinary floor mats to assist pedestrians is perfectly reasonable, and the fact that a person trips on one of them is no evidence of negligence."**

Id. at 277, (citation omitted) (emphasis added).

In another slip-and-fall case in which the plaintiff relied on the mere occurrence as proof of negligence, the Court of Appeals held, "[t]here is no evidence that any dangerous condition in fact existed. Ms. Treadwell merely alleges that the floor was slippery." *Treadwell v. Circus Circus Mississippi, Inc.*, 942 So.2d 221, 223 (Miss. App. 2006). Therefore, according to the decisions in *Sears*, *Bernard,* and *Galloway*, Stanley must show that the rubber bath mat was either a dangerous instrumentality *per se* or that the mat was placed in the hotel shower in a dangerous condition. Mr. Stanley's assertion that the shower or rubber bath mat was slippery is not evidence of a dangerous condition.

Both Mr. Stanley and his wife testified that Joanne Stanley had taken a shower prior to Mr. Stanley taking his shower. [R.152, 173] Mrs. Stanley testified that lighting in the bathroom was adequate, and that she had no difficulty seeing while she was in the shower. [R.163] There was nothing unusual about the shower, the faucet worked properly, and the water from the showerhead stayed within the shower. [R.159.] The rubber shower mat was already in the tub when she got in. [R.151.] She denied using the rubber mat, stating "I was standing, more or less, behind the mat." [R.150-151.] Although she described the bathtub to be slick, she stated that she had no trouble maintaining her balance in the shower. [R.162.] When asked if she warned her husband about the bathtub being slick, she said that she did not remember, but stated "[w]e have been in tubs there that's been slick." [R.166.] The shower mat was straight when she got out of the tub. [R.166.]

Regarding how the incident occurred, Bill Stanley testified as follows: "And I remember getting in [the shower] and started to turn around to get the rest of my body wet, and that's the last thing I remember until I hit the floor." [R.174.] He testified that "as best he could remember", the mat "probably" started sliding when he moved his foot to turn around. [R.178.] When asked whether the mat was slippery when he got in the shower, he replied "[w]ell it's been a long time", but stated that the rubber mat "didn't seem to [give way any]". [R.178.] Stanley did not recall if the mat was centered when he got into the tub, stating "That, I don't know." [R.180.]

Mr. Stanley's account of how the accident occurred (immediately following the incident) to the security investigator at Boyd Tunica stated that he was lathered up and turned in the tub to rinse when the rubber mat slipped causing him to fall. [R.183-184, 188.] An inspection of the bathroom was made by the security investigator who found a rubber shower mat twisted in the shower/tub. [R.183-184, 188.] Further investigation revealed normal lighting in the bathroom and no other defects were found. [R.184, 190.]

Not unlike that purpose noted by the Supreme Court in a case involving a rubber entrance mat in stores on rainy days, the rubber shower mat was placed in the shower for the purpose of improving the safety of the premises for hotel patrons who showered. *Galloway v. J.C. Penny Company*, 235 So.2d 275, 276 (Miss. 1970). There is no proof that the shower mat was dangerous in and of itself, or that it was placed in the shower in a dangerous condition. The fact that Mr. Stanley slipped and fell in the hotel shower is not evidence of any negligence on the part of Boyd Tunica. Mississippi courts have recognized that the mere allegation of a slippery floor is not evidence of a dangerous condition. *See Treadwell v. Circus Circus Mississippi, Inc.*, 942 So.2d 221, 223 (Miss. App. 2006) (a business owner owes a business invitee a duty of ordinary care to keep the

premises in a reasonably safe condition); *Elgandy v. Boyd Mississippi, Inc.*, 909 So.2d 1202 (Miss. App. 2005) (patron offered no evidence that resort had actual or constructive notice of any not readily apparent condition of slipperiness in and around whirlpool bath). Accordingly, there is no evidence in this case that any dangerous condition existed, and Stanley has failed to provide proof substantiating an essential element of his claim.

B. The trial court's grant of summary judgment was consistent with the undisputed, material evidence which does not show that Boyd had notice of any alleged dangerous condition.

In his appeal brief, Stanley asserts that the trial court erred by granting Boyd Tunica's Motion for Summary Judgment because "the evidence presented by the Plaintiffs created a triable issue of fact concerning the issue of notice." [Brief of Appellant at 3] The "issue of notice" is the only issue that Stanley raises as error in this appeal, which assumes that some dangerous condition existed. Boyd Tunica denies that any dangerous condition existed, as discussed in section "A" *supra*, however, assuming that a jury could find that some dangerous condition existed, Stanley's claim that Boyd Tunica had notice of a dangerous condition fails according to both proper application of the law and on the undisputed facts in this case.

Mississippi law requires that in order to establish notice, the plaintiff must show that the proprietor "had actual knowledge of a dangerous condition, *or* the dangerous condition existed for a sufficient amount of time to establish constructive knowledge, in that the proprietor should have known of the condition, *or* the dangerous condition was created through a negligent act of a . . . proprietor or his employees." *Munford, Inc. v. Fleming*, 579 So.2d 1282 (Miss. 1992).

Stanley claims that he "presented evidence of notice of the dangerous condition because Boyd had exclusive control of the room" [Brief of Appellant at 3], and goes on to state that "[n]o

proof of the owner's knowledge of the condition is necessary where the condition is created by his negligence or the negligence of someone under his authority . . . [i]n the case subjudice, the condition of the rooms was under the exclusive control of Boyd . . . [t]he condition of the tub mat and the lack of hand bars was under the control of Defendant Boyd, and the Plaintiffs were not required to prove actual notice in order to submit this case to a jury." [Brief of Appellant at 7]

Stanley's facts, logic, and recitation of the applicable law in this case are all misguided. He cites both *Lockwood v. Isle of Capri Corporation* and *Drennan v. Kroger Company* for the concept that "[n]o proof of the operator's knowledge of the [dangerous] condition is necessary where the condition is created by his negligence . . ." [Brief of Appellant at 3, 7] However, *Lockwood* and *Drennan* are distinguishable from the case at bar in that both of those cases dealt with people who slipped and fell in public areas of the proprietor's business as opposed to a hotel room which was being privately occupied. *Lockwood v. Isle of Capri Corporation*, 962 So.2d 645 (Miss. App. 2007); *Drennan v. Kroger Company*, 672 So.2d 1168 (Miss. 1996). The hotel bathroom, including the "condition of the tub mat", was not under the "exclusive control" of Boyd Tunica as Stanley claims. At the time of the incident, the room had been occupied nearly a full day by the Stanleys, and the shower had already been used by Mr. Stanley's wife before he entered the shower. Clearly, the bathroom was not under Boyd's exclusive control.

Stanley asserts an argument which is based on the doctrine of *res ipsa loquitur* which asks the court to infer negligence based on the facts of the circumstance. In order for *res ipsa loquitur* to apply, the plaintiff must prove: (1) that the defendant had control and management of the instrumentality causing the plaintiff's injury; (2) the injury must be the kind that in the ordinary course of things would not occur if those in control of the instrumentality used proper care; and, (3)

it only applies where the injury is not a result of the plaintiff's voluntary act. *Gray v. Bellsouth Telecommunication, Inc.*, 2009 WL 1856735 (Miss. App.). "Moreover, *res ipsa loquitur* does not apply when there has been specific proof which discloses some reasonable explanation for the happening other than the negligence charged against the defendant." *Id.*

Stanley's claim fails on even the first element of necessary proof in that it can not be shown that Boyd Tunica had exclusive control and management of the hotel bathroom or rubber bath mat. The Stanleys had already occupied the room for almost an entire day prior to the time of the accident, and the shower had already been used by Mrs. Stanley. Additionally, it can not be said that Mr. Stanley's slipping and falling in the shower is the kind of accident which would not occur if Boyd Tunica had used proper care in maintaining the hotel shower/bathtub. As a reasonable explanation, it is entirely possible that Mr. Stanley slipped and fell due to negligence on his own part. There is other evidence in the record which could provide another reasonable explanation for Mr. Stanley's fall: he had health problems[2] [R.155-156.]; he had not eaten since his arrival the night before [R.165.]; he was disabled and did not request any special room accommodations [R.154, 167.]; and, his wife had showered before him [R.152, 173.]. Clearly, the doctrine of *res ipsa loquitur* is not applicable in this case.

While there is no proof that any dangerous condition was created by Boyd Tunica, Stanley cites *Mississippi Winn-Dixie Supermarkets v. Hughes* for the concept that he may establish constructive knowledge on the part of Boyd Tunica where "the condition of the room . . . existed for such a length of time that, in the exercise of reasonable care, [the proprietor] should have known of

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2 Mrs. Stanley testified that Mr. Stanley had been on Social Security disability "because of his heart" since the 1990s. [R.167.]

it." [Brief of Appellant at 4] Relying on the *Hughes* decision, Stanley argues that a jury question exists. *Mississippi Winn-Dixie Supermarkets v. Hughes,* 156 So.2d 734 (Miss. 1963). However, the *Hughes* case is distinguishable from the case at bar. In *Hughes*, a plaintiff tripped and fell on dried pasta which was on the floor in the aisle of a grocery store that had been occupied by the store manager only five minutes before the fall occurred. *Id.* The Supreme Court held that a jury could have reasonably found that in the exercise of reasonable diligence, the store manager should have seen the pasta and recognized the danger. *Id.* In the case at bar, the hotel room had been solely occupied by the Stanleys for nearly an entire day before the fall occurred, and the shower had already been used by Mr. Stanley's wife.

Citing *Hughes,* the Supreme Court has said that "proof merely of a fall . . . is insufficient to show negligence on the part of the proprietor." And, the Court concluded that "the doctrine of *res ipsa loquitur* is inapplicable in cases of this kind." *Sears, Roebuck & Company v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966). Stanley asserts that "[e]vidence supports a jury finding that the slippery bathmat, coupled with no hand bars to catch oneself if a fall occurred was present for and that the . . . employees of Defendant Boyd all overlooked it." [Brief of Appellant at 4] There is no evidence in this case that the *bathmat* was slippery. When Mr. Stanley was asked whether the mat was slippery when he got in the shower, he replied "[w]ell it's been a long time", but stated that it "didn't seem to [give way any]". [R.178.] Mrs. Stanley testified that the *bathtub* was slippery. [R.150.] The Mississippi Supreme Court has recognized that "many business concerns . . . install[] rubber mats for the obvious purpose of improving the safety [or slipperiness] of the premises." *Galloway v. J.C. Penny Company*, 235 So.2d 275 (Miss. 1970) (patron slipped and fell on rubber mat in front of entrance doors to store).

In *Elgandy v. Boyd Mississippi, Inc.*, the Mississippi Court of Appeals held that Boyd Mississippi was not responsible for a patron's injuries when she slipped and fell attempting to enter a whirlpool bath at the hotel. *Elgandy v. Boyd Mississippi, Inc.*, 909 So.2d 1202 (Miss. App. 2005). In its reasoning, the appellate court found that the plaintiff had failed to present any evidence that the hotel had actual or constructive notice/knowledge of **"any not readily apparent condition of slipperiness in and around the jacuzzi."** *Id.* at 1206 (emphasis added). There is no evidence in this case that the *rubber mat* was slippery prior to the subject accident or that slipperiness in the tub was not a readily apparent condition.

There is simply no evidence that Boyd Tunica created a dangerous condition or had notice (actual or constructive) that a dangerous condition existed. There is no evidence that the rubber mat was slippery prior to the subject accident, much less that it had been slippery for such a length of time that in the exercise of ordinary care Boyd Tunica should have discovered some slipperiness about the mat. There is also no evidence that the subject rubber mat or other rubber mats in the hotel's showers had slipped while being used so as to put Boyd Tunica on notice of a problem. Stanley has wholly failed to meet his burden to show some genuine issue of material fact and establish evidence to support the essential elements of his claim.

CONCLUSION

On appeal, a trial judge's decision to grant summary judgment should be affirmed where the evidence shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The trial court is not permitted to try issues of fact on a Rule 56 motion; it may only determine whether or not there are issues to be tried. In the case at bar, Judge Smith noted in his ruling that "[t]his Court finds that even taking the facts as the Plaintiff presents

them, there is no genuine issue of material fact." [R.319-320.]

The undisputed, material facts in this case have not changed. Mr. Stanley slipped and fell on a rubber bath mat while showering in a hotel bathroom at the Sam's Town Hotel. His wife had used the shower before Mr. Stanley got into it. Mr. Stanley testified that he did not know whether the mat was slippery when he got in the shower, but that it didn't seem to give way. His testimony as to how the accident occurred was that "as best he could remember" the rubber mat "probably" started sliding when he moved his foot to turn around.

Stanley's argument that Boyd had notice *assumes* that some dangerous condition existed. However, based on the undisputed facts, Boyd has shown there was no evidence that any dangerous condition existed. Even assuming some dangerous condition could be found, there was no evidence that Boyd Tunica created a dangerous condition or had knowledge of any dangerous condition of which it would have a duty to warn Mr. Stanley.

Mississippi Courts have recognized that a claim of a slippery floor alone is not evidence of a dangerous condition and that slipperiness in and around a bath is a readily apparent condition. There is no evidence that the bath mat was placed in the shower in a way which would constitute a dangerous condition. The hotel bathroom and tub were not under the exclusive control of Boyd Tunica as the Stanleys had occupied the room for almost twenty-four hours prior to the accident. Therefore, it can not be shown that Boyd created a dangerous condition in the bathroom. Further, there is no evidence that Boyd had actual or constructive knowledge of any alleged dangerous condition

In order to prevail on a motion for summary judgment, the moving party needs only to show the absence of evidence to support an essential element of the non-movant's claim. The burden then

shifts to the non-movant to show evidence supporting the essential elements of his claim and that there is some triable issue of fact for the jury. Stanley has failed to meet this burden and, therefore, Boyd Tunica is entitled to judgment as a matter of law. The trial court properly granted summary judgment in favor of Boyd Tunica in this matter and therefore, the judgment of the trial court should be affirmed.

Respectfully submitted, this the 22nd day of July, 2009.

BOYD TUNICA, INC. D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL

BY: 

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CERTIFICATE OF SERVICE

I, Richard C. Williams, counsel of record for Appellee, Boyd Tunica, Inc. d/b/a Sam's Town Hotel and Gambling Hall, do hereby certify that I have this day caused to be served, via United States mail, postage pre-paid, a true and correct copy of the foregoing document to the following:

The Honorable Albert B. Smith, III
Tunica County Circuit Court Judge
Post Office Box 478
Cleveland, MS 38732

Dana J. Swan, Esquire
Chapman, Lewis & Swan
Post Office Box 428
Clarksdale, Mississippi 38614

This, the 22nd day of July, 2009.

RICHARD C. WILLIAMS, JR.
ASHLEY PRADEL